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No. 80-1481

# In the Supreme Court of the United States

OCTOBER TERM, 1981

**BREAD POLITICAL ACTION COMMITTEE, NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION, LUMBER DEALERS POLITICAL ACTION COMMITTEE, NATIONAL RESTAURANT ASSOCIATION, and the RESTAURATEURS POLITICAL ACTION COMMITTEE,**
***Appellants,***

**vs.**

**THE FEDERAL ELECTION COMMISSION, ET AL.,**
***Appellees.***

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY BRIEF FOR APPELLANTS

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# TABLE OF CONTENTS

PAGE

Argument ..... 1

Introduction ..... 1

I. Jurisdiction over this appeal is proper under 2 U.S.C. §437h ..... 2

II. Section (D) constitutes an unconstitutional prior restraint ..... 4

III. Section (D) abridges the speech and associational freedom of plaintiffs and those with whom they share an affinity of interest ..... 7

IV. Section (D) is violative of the due process clause of the Fifth Amendment ..... 16

V. Section (D) is vague and overbroad ..... 18

Conclusion ..... 20

## LIST OF AUTHORITIES

*Cases*

PAGE

Abood v. Bd. of Education, 431 U.S. 209 (1977) ..1, 6, 14, 15

ACLU v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973) *dismissed as moot*, 422 U.S. 1030 (1975) ..... 5, 6

Anderson v. Martin, 375 U.S. 399 (1964) ..... 17

Bread Political Action Committee v. The Federal Election Commission, 591 F.2d 29 (7th Cir. 1979) ..... 3

Bread Political Action Committee v. The Federal Election Commission, 635 F.2d 621 (7th Cir. 1980) (*En Banc*) ..... 3

Broderick v. Oklahoma, 413 U.S. 606 (1973) .....14, 18

Buckley v. Valeo, 424 U.S. 1 (1976) ....2, 3, 6, 8, 9, 10, 13, 16

CBS v. The FCC, ..... U.S. ..... (1981), 69 L.Ed. 2d 706 ..... 8

Citizens Against Rent Control v. City of Berkeley, ..... U.S. ....., 50 U.S. L.W. 4073 (1981) .....8, 13, 15

Citizens and Southern National Bank v. Bougas, 434 U.S. 35 (1977) ..... 2

Cleveland Bd. of Education v. LaFleur, 414 U.S. 632 (1974) ..... 8

CMA v. FEC, ..... U.S. ..... (1981); 69 L.Ed.2d 567 .....3, 16, 17

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) .....7, 11

Davis v. Pringle, 268 U.S. 315 (1925) ..... 10

Elrod v. Burns, 427 U.S. 347 (1976) ..... 15

PAGE

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) ..... 4, 6, 9, 14, 15

Frost Trucking Co. v. Railroad Commission, 271 U.S. 577 (1925) ..... 15

Griffin v. Illinois, 351 U.S. 12 (1955) ..... 17

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) ..... 9

Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) ..... 19

Illinois State Bd. of Election v. Socialist Workers, 440 U.S. 173 (1979) ..... 7

In Re Primus, 436 U.S. 412 (1979) ..... 18

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) ..... 6

Marsh v. Alabama, 326 U.S. 501 (1946) ..... 6

Martin Tractor v. FEC, 627 F.2d 375 (D.C. Cir.), *cert. denied*, ..... U.S. ..... (1980) ..... 19

NAACP v. Alabama, 357 U.S. 449 (1958) ..... 5

National Right to Work Committee v. FEC, ..... F.2d ..... (D.C. Cir. 1981) ..... 10

Nixon v. Administrator of General Services Administration, 433 U.S. 425 (1977) ..... 6

Ohralik v. The Ohio State Bar Association, 436 U.S. 447 (1978) ..... 18

Pennekamp v. Florida, 328 U.S. 331 (1946) ..... 2

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) ..... 3

Pipefitters v. United States, 407 U.S. 385 (1972) ..... 14

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) ..... 6

Rowan v. Post Office, 397 U.S. 728 (1970) ..... 6

PAGE

Smith v. California, 361 U.S. 147 (1959) ..... 6

United States v. Calandra, 414 U.S. 338 (1974) ..... 12

United States v. CIO, 335 U.S. 106 (1948) ..... 6, 14

Vitek v. Jones, 445 U.S. 480 (1980) ..... 15

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) ..... 9

Williams v. Rhodes, 393 U.S. 1 (1968) ..... 15

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) ..... 3

*Statutes*

2 U.S.C. §437g ..... 4

2 U.S.C. §437h ..... 2, 3, 4

2 U.S.C. §441a ..... 10, 11

2 U.S.C. §441b ..... 10

2 U.S.C. §441a(a)(5) ..... 10

2 U.S.C. §441b(b) ..... 16

2 U.S.C. §441b(b)(2)(C) ..... 13

2 U.S.C. §441b(b)(4) ..... 16

2 U.S.C. §441b(b)(4)(B) ..... 12

2 U.S.C. §441j ..... 12

18 U.S.C. §371 ..... 11

18 U.S.C. §1001 ..... 11

18 U.S.C. §1341 ..... 11

*Constitution of the United States*

First Amendment ..... *passim*

Fifth Amendment ..... 18

*Periodicals*

PAGE

J. Murphy, The Impact of First National Bank v. Bellotti, The Corporation in Politics, 47-55 (Practicing Law Institute 1979) ..... 14

*Other Authorities*

Tribe, American Constitutional Law (1978) ..... 17

122 Cong. Rec. S. 6292 (March 16, 1976) ..... 9

122 Cong. Rec. S. 6694 (March 16, 1976) .....9, 10, 13

122 Cong. Rec. S. 6700 (March 16, 1976) ..... 9

Brief of the United States in CBS v. FCC, No. 80-207 .. 8

90 Stat. 1503 ..... 9

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## ARGUMENT

### INTRODUCTION

The overriding concern behind the Federal Election Campaign Act was the problem of corruption of elected representatives through the creation of political debts resulting from lavish financial contributions. Equally important, however, was the goal of preservation of the individual citizen's confidence and participation in government. Indeed, the Act's "underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Auto Workers*, 352 U.S. 567, 575, 590 (1957) (*See also* App. Br. at 28).

As we have shown in our opening brief, the restraints imposed by §(D) not only undermine these goals but disserve the First Amendment. Absent §(D), there will be a freer flow of political information and enhanced involvement in the political affairs of the Nation by a substantial segment of our people. For no longer will the right of political association be dependent upon the arbitrary, censorial decisions of corporations—the very entities which supposedly have had so pernicious an influence on the electoral process. Instead, those decisions will emanate, as the First Amendment intended, from the mind and conscience of the individual. *Abood* v. *Bd. of Education*, 431 U.S. 209, 234-35 (1977).

Counterpoised against the palpable harm which has and will continue to result if §(D) is sustained, is the absence, if it is invalidated, of any injury to the goals which are subserved by the Act. As we have shown, and as we shall further explain below, a declaration of unconstitutionality will not harm in the slightest the statutory machinery. Unimpaired will be the contribution limitations, the disclosure and reporting requirements, the anti-proliferation rules, the criminal and civil sanctions and all of the other provi-

sions which contribute in a meaningful and necessary way to the overall functioning of the Act.

The FEC has met the force of these and the other arguments in our opening brief by ignoring them. And instead of subjecting the Act to the exacting scrutiny mandated by the First Amendment, it has succumbed to that mode of thought whereby phrases are made to do service for critical analysis by being turned into dogma. *Pennekamp* v. *Florida*, 328 U.S. 331, 352 (1946) (Frankfurter, J., concurring). Indeed, for the FEC, resolution of this case requires only the undiscerning repetition of the shibboleth, "electoral integrity"—that single supreme simplicity to which all other values are subordinated.

In what follows, we shall further demonstrate the pervasively flawed bases upon which rest the Commission's contentions and those of the majority below.

## I.

Relying on a hyper-literal parsing of the supposedly "precise terms" of §437h,[1] the FEC contends that Congress has limited the availability of §437h to the three classes of expressly enumerated individuals and entities (i.e., the FEC, individual voters, and the national committee of a political party). (Gov. Br. at 12). Not surprisingly, no attempt is made to explain how this restrictive construction can be harmonized with the expansive construction accorded §437h by *Buckley* v. *Valeo*, 424 U.S. 1 (1976). (*See* App. Br. at 13-14).

*Buckley* is not explicable on the basis that among the plaintiffs were individuals eligible to vote. (Gov. Br. at 16). Indeed, as demonstrated in our opening brief, a careful reading of that case demonstrates that their presence was irrelevant to the Court's construction of §437h. (*See*

[1] *But see*, Citizens and Southern National Bank v. Bougas, 434 U.S. 34, 45 (1977) (referring to "the inexactitude of Congressional language" in FECA).

App. Br. at 13-14). Additionally, *Buckley* "makes it clear that organizations may have standing under §437h if they otherwise meet the requirements for 'associational standing.'" *BreadPAC* v. *FEC*, 591 F.2d 29, 36 (7th Cir. 1979), *aff'd en banc*, 635 F.2d 621 (7th Cir. 1980). As the Seventh Circuit recognized, precisely the same situation obtains in the instant case as was present in *Buckley*, for the record makes clear that the appellants have individual members, and that the test for associational standing has been satisfied. *See* 591 F.2d at 36.[2]

In the last analysis, the FEC's cramped and labored construction of §437h is bottomed on the contention that the rights established by the Act can only be vindicated by the expressly enumerated parties since only they truly represent the "public interest [rather than] their own interest in maximizing their political influence." (Gov. Br. at 12-13).[3] At least three flaws are manifest in this reasoning.

First, just as purely private litigation under the antitrust laws is in the public interest,[4] so too is quasi-private litigation having as its end a determination of the constitutionality of the Act. Second, an expansive construction of §437h will not diminish the role of the FEC in litigation under the Act. It will do no more than cast the Commission in the role of defendant rather than plaintiff. Surely, the public interest cannot be said to depend upon procedural positioning.

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[2] BreadPAC, RPAC, and LudPAC, which are "separate, distinct legal entities", CMA v. FEC, ___ U.S. ___ (1981), 69 L.Ed.2d at 581, and n.17, are composed *entirely* of individual members.

[3] This contention is demonstrably false, for the interests of the national committee of a political party are obviously in "maximizing [its] political influence" rather than advancing some abstract notion of public interest.

[4] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 340 (1971); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

Third, it is illogical to suggest that the public interest in a determination of the constitutionality, *vel non*, of basic provisions of the Act is greater if obtained by one of the parties enumerated in §437h. It is the rapid and certain determination of constitutional questions by this Court, *simpliciter*, that serves the public weal; the identity of the plaintiff neither enhances nor diminishes the value of that determination.

Acceptance of the FEC's suggestion that constitutional challenges should be raised defensively in enforcement proceedings under §437g (Gov. Br. at 13) would not be in the public interest. Fearing the imposition of the Act's civil and criminal sanctions, citizens, both individual and corporate, will avoid engaging in speech and conduct which might even remotely be suspect by the FEC. *Cf.*, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785 n.21 (1978). This avoidance, of course, precludes the possibility of the very enforcement proceeding in which the constitutional issue could be raised. In short, relegating constitutional challenges to the limbo of enforcement proceedings would chill First Amendment activity while the FEC intentionally remained inert, thereby avoiding a judicial determination of questionable provisions of FECA.

Finally, as previously demonstrated, relegating constitutional challenges to general federal question jurisdiction is itself antithetical to the public interest. (*See* App. Br. at 15-16).

## II.

In our opening brief, we demonstrated that the provision of §(D) which makes solicitation dependent upon receipt of advance permission from the corporate employer has created a system of prior restraint indistinguishable in its censoring effect on speech and associational freedoms from the licensing systems consistently invalidated by this and other courts. (See App. Br. at 16-29). Perhaps recognizing its inability to overcome the presumption of unconstitutionality borne by any system of prior restraint

(*id.* at 27), the FEC makes the desperate claim that the regime of censorship created by §(D) does not constitute a prior restraint because it is accomplished by a private corporation rather than an administrative official. (Gov. Br. at 30). This contention ignores the reality that §(D) does not merely passively allow, but rather explicitly and affirmatively mandates, corporate censorship.

In addition, it is contrary to every case which has ever considered a problem with comparable dimensions. Illustrative is *ACLU* v. *Jennings*, 366 F.Supp. 1041 (D. D.C. 1973) (3 judge court), *appeal dismissed as moot*, 422 U.S. 1030 (1975). There, the ACLU sought to enjoin enforcement. Title I of the Federal Election Campaign Act of 1971, which required that any person desirous of publishing an advertisement either "on behalf" or in "derogation of" a candidate had first to obtain certain certifications from the candidate. Without such a certification, a newspaper could not lawfully publish the advertisement. In holding Title I to be violative of the First Amendment, the court underscored the impermissible nature of the prior restraint imposed by the Act. There, as here, the Congress had, in effect, delegated censorial powers to *private* corporate and individual citizens. That fact was deemed of no significance, for the censorship stemmed from the compulsion of the statute. *Id.* at 1049.

Also instructive is *NAACP* v. *Alabama*, 357 U.S. 449 (1958), which rejected the argument that the consequences of disclosure of the NAACP's membership were not the result of state action, but of private prejudices:

> "It is not sufficient to answer, as the state does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for its only after the initial exertion of state power represented

by the production order that private action takes hold." Id. at 463 (Emphasis in original).[5]

The most glaring deficiency in the FEC's presentation is the absence of any attempt to explain how the prior permission rule furthers the goals of eliminating corruption and preserving the confidence of our people in government. (App. Br. at 31-42). There are, of course, vague allusions to the importance of electoral integrity, coupled with a plea for judicial deference to the means chosen by Congress. (Gov. Br. at 25, n.23). However, as *Buckley* and *ACLU* v. *Jennings* teach, that interest can neither be invoked as a talismanic incantation to support any exercise of power (App. Br. at 30, n.42),[6] nor as a basis for relaxation of the rigorous standard of review required by the First Amendment.[7]

Any rational assessment of the interests implicated by the Act reveals that they "are not served at all, or in other than a random manner, by the prohibition in §[D]." *Belotti, supra,* 435 U.S. at 788. In addition, such an assessment ineluctably leads to the firm conclusion that, in its operative effect, the prior permission rule has subjected the First Amendment rights of vast numbers of our people to the "arbitrary discretion", (*Nixon* v. *GSA,* App. Br. at 25, n.34) of their corporate employers. This broad-based apparatus of censorship disserves the First Amendment by "indiscriminate[ly] interfer[ing]" with freedom of association, *Abood, supra,* 431 U.S. at 234, n.30, and sub-

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[5] *Cf.*, Smith v. California, 361 U.S. 147, 154 (1959); Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976); Rowan v. Post Office, 397 U.S. 728, 741 (1974) (Brennan J., concurring); Marsh v. Alabama, 326 U.S. 501, 506-09 (1946).

[6] *Cf., Bellotti, supra,* 435 U.S. at 788; Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977); *Abood, supra.*

[7] The exacting scrutiny required in First Amendment cases is not pretermitted even where there are explicit legislative findings. *See* Landmark Communications Inc. v. Virginia, 435 U.S. 829, 843-44 (1978); United States v. CIO, 335 U.S. 106, 139-40 (1948) (Rutledge, J., concurring).

verts the Act's underlying purposes. (App. Br. at 16-29; 31-32; 37-43).[8]

## III.

### A.

Rather than responding in any principled way to the arguments in Part III of our opening brief, the FEC underscores the fact that §(D) allows the appellants to engage in a variety of political activity unrelated to political solicitation. (Gov. Br. at 20-21; 26-27). However, as shown in our opening brief, the First Amendment will not brook significant restraints on political solicitation merely because restrictions are *not* imposed on other separate, distinct forms of protected activity. (App. Br. at 19-23).[9]

Moreover, even if the argument had some validity as applied to appellant-*trade associations*, it can have no pertinence as applied to the appellant-*political committees* which are separate jural entities that in the main exist only for the purpose of making political solicitations and contributions. Nor is the FEC's partial paralysis argu-

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[8] The suggestion that §(D) "does not provide for any form of prior censorship of First Amendment activity" because "corporations could exercise the same power simply by not joining a trade association" (Gov. Br. at 30-31) overlooks the fact that a corporation's decision whether to join a trade association is a business determination free of any governmental compulsion. That a negative decision would place the corporation's executives outside the class of permissible solicitees, *as defined by §(D)*, is simply the incidental effect of that purely private decision. A very different situation is presented when the corporation is invested by statute with absolute, unreviewable, arbitrary power to determine whether its employees can receive political information (*See* App. Br. at 26-28).

[9] *Compare* Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) (prohibition against inserts in utility bills held unconstitutional even though there clearly were alternative avenues available to inform customers); Illinois State Bd. of Election v. Socialist Workers, 440 U.S. 173, 184 (1979) (ballot restrictions affect associational freedoms and may be unconstitutional even though other aspects of right of political association are unaffected).

ment sufficiently sensitive to the fact that §(D)'s restraints affect the fundamental right of potential contributors to receive information about candidates[10] and thereafter to exercise the right of political association through the medium of a political committee. (*See* App. Br. at 20-22).[11]

**B.**

Relying on the *a priori* conclusion of the majority below, the FEC ominously warns that without the single solicitation rule of §(D)[12] there would be a "'proliferation of trade associations and solicitations which would, in turn, undermine the very purpose of the Act's restrictions on the use of corporate treasuries in federal elections.'" (Gov. Br. at 25-26).

These result-oriented, hypothetical, "after-the-fact rationalizations", *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring), are unacceptable since they find no support either in the legislative history of the 1976 Amendments or in any critical and

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[10] The Solicitor General recently acknowledged that in the hierarchy of First Amendment rights, the right of the public to receive such information is "supreme". Brief for the United States in CBS v. FCC, No. 80-207 at 60. *See also Buckley, supra*, 424 U.S. at 14-15. For the reasons advanced at pages 19-23 of our opening brief and in *Citizens Against Rent Control* v. *Berkley*, ___ U.S. ___ (1981), 50 L.W. 4073, §(D)'s abridgements cannot be dismissed as insignificant merely because they have not completely emasculated the First Amendment rights of potential contributors.

[11] Illustrative is the incredible claim that §(D) does not affect individual rights at all. (Gov. Br. at 10; 29). This contention blinks reality and is contrary to the district court's unchallenged Findings of Fact. (*See* App. Br. at 2-5; 20-22; 29; 635 F.2d at 639 (dissenting opinion)).

[12] Section (D) is comprised of two distinct restraints: the prior permission rule and the single solicitation rule, which prohibits solicitation by more than one trade association in any year even though, as here (Findings 76; 181), the trade associations are autonomous and have non-identical goals and memberships.

discerning analysis of the ultimate purposes of the Act.[13] The legislative history of the 1976 Amendments reveals that they were passed "without adequate hearings", 122 Cong. Rec. S.6292 (March 16, 1976) (Remarks of Senator Griffin), and in extraordinary haste in order to satisfy the time pressures imposed by the *Buckley* decision. (Id. at 6692-93; 6701; 6703) (Remarks of Senators Cannon, Hatfield and Griffin).[14] Moreover, the Congress' central focus was on the reconstruction of the FEC. Consequently, the restraints of §(D) were never discussed or analyzed. Indeed, while there was an isolated reference to the *existence* of §(D) in the Senate debates, (*id.* at 6700), there was no discussion about the purposes of or justifications for its dual restraints.[15]

In marked contrast to the inattention given to §(D) is Congress' careful consideration of the "anti-proliferation" provisions, which were designed neither to prevent solicitations nor the growth of trade associations. Rather, they were expressly intended to prevent evasion of the contribution limitations by unions, corporations, individuals and groups "by curtailing the vertical proliferation of political committee *contributions*, by providing that all contributions made by a PAC established, controlled, financed, or maintained by any person or group of persons shall be considered to have been made by a single political committee." 122 Cong. Rec. S.6694 (Emphasis supplied). *See also* App.

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[13] In both the First Amendment and equal protection contexts, this Court has repeatedly refused to sanction post-hoc, speculative theorizing when an examination of the legislative context and purpose belies the asserted purpose. *See Bellotti, supra* 435 U.S. at 792-93; Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

[14] *See, generally,* 90 Stat. 1503.

[15] Section (D) was not even in the Senate version of the bill. *See* 122 Cong. Rec. S.6700. It is thus demonstrably false to suggest that §(D) is an integral part of a carefully thought out, delicately balanced legislative scheme.

Br. at 40.[16] Surely "[i]t is incredible that after conspicuous mention of the [anti-proliferation provisions] in the first place at the beginning of [§441a], Congress should have intended to smuggle in a [second section which serves "*a similar purpose*"[17]] by muffled words at the end [of §441b]." *Davis* v. *Pringle*, 268 U.S. 315, 318 (1925) (Holmes, J.).

In sum, the single solicitation rule cannot be sustained as a valid loophole closing device since, by virtue of the anti-proliferation provisions (§441a(a)(5)), there is no loophole left to close. Rather, as the FEC has elsewhere conceded, §(D) constitutes a purposeful attempt to limit the fundraising potential of trade associations (App. Br. at 32). Yet, as we have shown, such a purpose cannot withstand constitutional scrutiny. (*Id.* at 47).

The majority's attempt to justify §(D) on the ground that it serves to prevent "a proliferation of . . . solicitations" overlooks the fact that it is not the solicitation of contributions, but the making of lavish contributions which poses the threat to the integrity of the election process. *See National Right To Work Committee* v. *FEC*, ..... F.2d ..... (D.C. Cir.) (Slip Op. 80-1487 at 8, September 4, 1981). It is for this reason that the Act does not restrict either the number of solicitations or the amount of money which PACs can aggregate. Indeed, it was precisely because the Act accorded the opportunity for unimpeded solicitations that this Court in *Buckley* validated its contribution limitations. (App. Br. at 31). Thus, properly viewed, the single solicitation rule prevents the very thing which *Buckley* found justified the restrictions on the First Amendment right to make political contributions. We fail

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[16] In discussing the import of the anti-proliferation provisions, Senator Cannon stressed that contributions from a trade association and the PACs of its corporate members would *not* be aggregated for purposes of the contribution limits. 122 Cong. Rec. S.6694.

[17] Gov. Br. at 24 (Emphasis supplied).

to perceive how such an irrational consequence furthers any compelling interest.

Apart from the analytical deficiencies discussed above, the majority's argument is persuasive only if it rationally could be supposed that, absent the single solicitation rule, a substantial number of corporations would, in fact, be willing to fraudulently proliferate "dummy" associations (635 F.2d at 640) in order to evade the effects of the anti-proliferation rules.[18] For it is fundamental that the First Amendment will tolerate no restraints predicated upon conjecture or refined speculation that untoward consequences might result. (*See* App. Br. at 27, n.40).[19]

This willingness, of course, depends upon whether the risks are exceeded by the benefits. The risks in making contributions through the vehicle of a "dummy" trade association are glaringly apparent. Since the purpose of the creation of such an alter-ego is to evade the Act's contribution limitations, contributions by the controlled association PAC presumably would violate §441a. Additionally, to screen the conspirators' illicit scheme, false reports necessarily would have to be filed with the FEC, thereby violating the Act's reporting and disclosure provisions, and its prohibition against the use of nominees (*see* App. Br. at 40-41), as well as 18 U.S.C. §§371 (conspiracy); 1001 (false statements to a federal agency); and 1341 (mail fraud). Those responsible for the fraud would face

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[18] The circumvention postulated by the majority could only occur with the active connivance of a number of corporations willing to expend substantial sums of money to create a facade of legitimacy and willing to risk the awesome criminal penalties which could be imposed if the fraudulent enterprise were detected. For, as the minority conclusively demonstrated, absent a pervasive conspiracy, no single corporation could exercise a sufficient degree of dominance over a trade association's affairs. 635 F.2d at 640.

[19] *See also Consolidated Edison, supra*, 447 U.S. at 543 ("Mere speculation of harm does not constitute a compelling state interest.").

staggering jail terms and fines under Title 18 and under the Act's criminal provisions. (§441j).

Counterpoised against the obvious and crushing risks would be exceedingly speculative and limited benefits. The conspirators' ability to make illegal contributions through the "dummy" trade association PAC would depend upon "illicit" solicitations having generated sufficient revenues and on the unlikely concurrence among the co-conspirators regarding the identity of the potential recipient of the contribution. Given the uncertainty of any fundraising effort, coupled with the fact that the controlled PAC would be competing with other trade association PACs for funds *see, e.g.*, Finding 148, from the same fixed pool of solicitees, it could not be said with even a reasonable degree of certainty that enough money could ever be raised to make the enterprise worthwhile. When to the balance are added competitive internal solicitations by the corporate conspirators own PACs *and* the biannual union solicitations allowed by §441b(b)(4)(B), the prospects become even more dismal.[20]

In short, it is quixotic to suggest that the uncertain benefits which might be derived from the creation of a "dummy" trade association would motivate corporations to engage in the broad-based criminal conspiracy implicit in the majority's inordinantly speculative thesis.[21] And it would be naive to believe that corporations willing to proliferate trade associations to evade the Act's contribu-

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[20] If the corporate conspirators do not have PACs of their own, the chances of success are thus not reduced, *pro tanto*. However, in that event, it is luminously clear that a corporation would rather create its own PAC and engage in *lawful* solicitation than create a fraudulent PAC with the uncertainty of success and the potential for disastrous consequences in the event of discovery.

[21] In other contexts, this Court has refused to base rules and doctrine on such speculative assumptions. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 351 (1974).

tion limits would flinch at disobeying the single solicitation rule. *Compare Buckley, supra*, 424 U.S. at 45 (easily evaded expenditure limitations which impose restraints on First Amendment rights serve no societal interest).

Finally, as we have shown in our opening brief (pp. 40-41), in light of the elaborate mechanism set up by the Act to insure compliance with its contribution limitations, the single solicitation rule of §(D) *needlessly* imposes direct and immediate restraints on the appellants' First Amendment rights and on the speech and associational rights of potential contributors, without helping to effectuate the Act's contribution limitations. That being the case, it is violative of the First Amendment. (App. Br. at 30, n.42; 40-41; *Citizens Against Rent Control, supra*, 50 L.W. at 4073) (contribution limitations rendered unnecessary by other provisions of the statute).

**C.**

The dominant theme in the FEC's brief is that since Congress, in §441b(b)(2)(C), has accorded a statutory benefit to corporations by allowing them to use their funds to defer the administrative costs of PAC solicitation—a benefit to which the FEC claims they are not constitutionally entitled—it can condition the exercise of that benefit by the kinds of restraints in §(D). (Gov. Br. at 29-32). We have previously demonstrated that this argument is not supported by a single pronouncement of this or any other Court, and that it is contrary to the official interpretation of the Department of Justice as reflected in the formal Opinion Letter of Assistant Attorney General Thornburg. (App. Br. at 33-36),[22] which "is entitled

[22] The letter was issued to the FEC in connection with the Sun Oil Advisory Opinion 1975-23. The FEC's present claim that the affinity of interest standard was "specifically rejected" by Congress is erroneous. (Gov. Br. at 31, n.31). A reading of Senator Cannon's remarks and the debates on the 1976 Amendments makes clear that that standard was never discussed or debated as an option to the categories of permissible solicitees set forth in the Act. *See* 122 Cong. Rec. S.6694.

. . . to great weight. . . ." *Pipefitters* v. *United States*, *supra*, 407 U.S. at 409.[23]

This Court's prior decisions, as well as the debates on the Hansen Amendment, reflect that the evil at which the general prohibition against union and corporate *expenditures* was directed was the use of treasury funds *to influence the general public to vote for or against a particular candidate. See United States* v. *CIO*, 335 U.S. 106, 116, 121 (1948); *United States* v. *Auto Workers*, *supra*, 352 U.S. at 584-85, 587, 589, 592; *Pipefitters*, *supra*, 407 U.S. at 430-31. Since the solicitation of the stockholders and the executive and administrative personnel of a trade association's corporate members (and others having an affinity of interest, *see* App. Br. at 23, n.29; 35-36) neither serves that purpose nor is directed to the public at large, but solely to the only natural "constituents" a trade association can have, *Pipefitters*, *supra*, at 431, n.42, there can be no persuasive claim that such benign political activity, lying as it does at the core of the First Amendment,[24] can be constitutionally burdened by the restraints imposed by §(D).

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[23] The statements at page 31, n.31 of the FEC's brief are unpardonably false. As *Pipefitters* makes clear, the Hays' remarks were directed to the *unofficial* comments of some unspecified "Associate Deputy Attorney General" contained in a newspaper article. 407 U.S. at 424-25 and *id.* at nn. 38 and 39. *Moreover, Representative Hays could not have been referring to the Thornburg opinion letter since his comments antedated that letter by almost four years!*

[24] *See* App. Br. at 19, n.24, 24, n.32; Abood, *supra*, 431 U.S. at 234; Broderick v. Oklahoma, 413 U.S. 606, 616 (1973).

[25] The former General Counsel of the FEC has concluded that it is doubtful that the restraints on trade association solicitation can survive constitutional scrutiny. *See* J. Murphy, *The Impact of First National Bank* v. *Bellotti*, in The Corporation In Politics 55 (Practicing Law *Institute* 1979).

Nor does such solicitation pose a threat to the evil sought to be eradicated by the general prohibition against corporate and union *contributions*, namely the problem of actual or apparent corruption of elected representatives resulting from lavish financial contributions. Thus, the restraints of §(D) cannot be justified on this basis. Finally, even if all we have said is inaccurate and the Congress has the right to prohibit corporate expenditures to defray a PAC's solicitation costs, it does not follow that where that right is accorded by statute, its exercise may be conditioned by the kinds of otherwise unconstitutional and unnecessary conditions imposed by §(D)[26]

**D.**

The decisions of this Court make clear that substantial restraints on political solicitations and contributions implicate fundamental First Amendment rights and thus are subject to exacting judicial review. *See Citizens Against Rent Control, supra,* 50 L.W. at 4072; *Abood, supra,* 431 U.S. at 234-35. That review requires that before the restraints can withstand constitutional challenge, it must be shown that: the inhibitions on expressional and associational freedoms are truly necessary to further the goal of electoral integrity; that absent the curtailment of First Amendment rights, harm will certainly result; that the means employed are the least restrictive of associational freedoms; and that the benefits gained outweigh the harm to constitutionally protected rights. (App. Br. at 30, n. 42).[27] As the discussion in our opening brief demonstrates, §(D) fails to satisfy any of these criteria. *Id.* at 31-43.

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[26] *Cf.*, Frost Trucking Company v. Railroad Commission, 271 U.S. 577 (1925); Williams v. Rhodes, 393 U.S. 1, 28 (1968); *Bellotti, supra,* 435 U.S. at 798, n.14; *Elrod* v. *Burns,* 427 U.S. 347, 360-62 (1976); *Vitek* v. *Jones,* 445 U.S. 480, 488 (1980).

[27] The FEC seems to concede the applicability of these criteria. (Gov. Br. at 26).

Nothing in the plurality opinion in *CMA* v. *FEC*, *supra*, supports an argument for diminished judicial review in this case. Unlike the substantial restrictions created by §(D), the restrictions in *CMA* were marginal since they permitted at least the symbolic expression of support evidenced by a contribution. Here, the intended and inevitable effect of §(D) is to directly interdict solicitations thereby preventing the making of contributions and thus precluding even the symbolic expression of support evidenced by the act of contributing. And by preventing the contribution, §(D) interdicts the very act which serves to affiliate the contributor with the PAC and other like-minded persons. (*See* App. Br. at 31-32; 47).

## IV.

Reduced to its essentials, the FEC's response to the arguments in Part IV of our brief consists of a reiteration of the majority's holding that §(D) benefits rather than disadvantages trade associations. (Gov. Br. at 35).[28] For the reasons set forth in our opening brief, this contention is specious and at war with *Buckley's* recognition

[28] This contention is based on the FEC's dissection of the various subparts of §441b(b)(4) into its purportedly prohibitive and permissive components. (Gov. Br. at 35, n.33). The difficulty with this highly artificial mode of analysis is that it overlooks the inextricable concatenation between the various subparts of §441b(b), and it ignores the FEC's admission, as revealed by its acquiescence in certain findings of fact which were jointly submitted by it and the appellants to the district court, that §(D) is indeed restrictive. *See* Findings 140; 144. Moreover, this claim is belied by the district court's findings, by reality, and by the FEC's own Advisory Opinions. (See App. Br. at 3, n.8; 29; 32, n.44). Prior to §(D), appellants' solicitation activities were not circumscribed by the throttling restraints of §(D). (App. Br. at 2-3). It is thus absurd to suggest that their imposition, with all their devitalizing effects (App. Br. at 3-4; 29), has conferred a "benefit" on trade associations.

that even when a statute appears to be evenhanded, the appearance of fairness may not reflect political reality, as well as with the fundamental precept that realities must dominate judgment. (App. Br. at 43; 45).[29]

*CMA* v. *FEC*, *supra*, does not support the FEC's argument that §(D) is not invidiously discriminatory. In *CMA*, the plurality compared the restrictions placed on individuals and unincorporated associations, on the one hand, with those imposed on unions and corporations on the other. The plurality found that overall the Act imposed fewer restrictions on the former than on the latter. However, the plurality did not pretend to decide whether the restrictions imposed on unions and corporations on the one hand were comparable to those imposed on corporate trade associations on the other.

The only other aspects of the FEC's argument that merit a response are the claims that i) §(D) does not violate the due process clause since there is no "purposeful discrimination" and ii) that any disparity in treatment is rationally based. (Gov. Br. at 35, n.33; 38). We need not dwell long on either of these contentions.

The cases cited in support of the first argument all involved claims of racial discrimination. In that context, this Court has indeed required a showing of "purposeful discrimination." While such a showing is not a prerequisite in other equal protection cases, *see* Tribe, *supra*, 991, *et seq*, in any event it is satisfied here. (App. Br. at 32, n.44).

Contrary to the FEC's veiled suggestion, in cases implicating core First Amendment values, it is not enough to satisfy the *minimal* test of reasonableness.

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[29] *See also* Anderson v. Martin, 375 U.S. 399, 402-03 (1964); Griffin v. Illinois, 351 U.S. 12, 23 (1955) (Frankfurter, J., concurring) ("Law addresses itself to actualities."); L. Tribe, American Constitutional Law 1203 (1978).

Rather, the disparity in treatment must withstand the exacting scrutiny applicable in First Amendment cases. (*See* App. Br. at 48, n.53). Since, as we have shown, the restraints of §(D) fail to satisfy the criteria applicable in such cases, and since no restraints comparable to those in §(D) are imposed upon corporations and unions (Finding 201), it must be concluded that §(D) invidiously discriminates against trade associations in violation of the due process clause of the Fifth Amendment.

## V.

Where the term "solicitation" has been used in a statute without being explicitly defined, it has almost always been accorded its dictionary definition (i.e., a request, petition, entreaty). (*See* App. Br. at 48). *Significantly, however, the FEC does not say, because it cannot, that as used in §(D), "solicitation" was intended to have such an explicit and narrow definition*! On the contrary, it is clear that in §(D) Congress has disavowed the dictionary definition in favor of an oceanic concept that defines solicitation as "any action that could fairly be considered a request for a contribution." (*See* App. Br. at 48-49). This definition is flawed since it does not allow men of common intelligence to ascertain in advance what is forbidden, and it necessarily " 'puts the speaker wholly at the mercy of the varied understanding of his hearers' . . . ." (App. Br. at 48).[30]

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[30] The authorities relied on by the FEC (Gov. Br. at 38, n.34) do not support a contrary conclusion. Neither *Ohralik* v. *The Bar Ass'n*, 436 U.S. 447 (1978) nor *In Re Primus*, 436 U.S. 412 (1978) involved questions of statutory vagueness. In fact, the disciplinary rules involved in those cases did not use the term "solicitation", but rather spelled out in words the conduct which was prohibited. *See* 436 U.S. at 418, n.10; 436 U.S. at 453. It was this Court which employed the term "solicitation" to describe the petitioners' activities. *Broderick* v. *Oklahoma*, 413 U.S. 601 (1973) involved

(footnote continued)

The FEC's contention that §(D) is not vague because of the existence of the Advisory Opinion mechanism (Gov. Br. at 39-40) evades rather than answers the question presented here. While in some cases the harm to First Amendment values inevitably flowing from vague laws can be mitigated by the promulgation of a comprehensive body of principled administrative decisions designed to narrow and sharpen an objectionable statute, it is the body of decisions, not the mere existence of an advisory opinion mechanism, which is significant. In the context of this case, the advisory opinions have done nothing to alleviate the pervasive vagueness of §(D). Rather, they are episodic determinations which give no guidance beyond their immediate factual situations; they neither "shed much light on the Commission's interpretation of 'solicitation' activities", nor have they "much illuminated the meaning of 'solicit' . . ." *Martin Tractor* v. *FEC*, 627 F.2d 376, 390 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).

In conclusion, we can think of no better denunciation of §(D) than that unwittingly offered by the FEC. After stating the test for vagueness, the Commission said: "The term 'solicit' as used in FECA *falls far short* of this standard." (Gov. Br. at 38) (Emphasis supplied). We respectfully agree.

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(footnote continued)
a statute which prohibited, *inter alia*, certain political solicitations. The petitioner's vagueness argument and this Court's focus were *not* directed toward the word "solicitation", but rather centered on the ambiguity of the phrase "for any political organization, candidacy or other political purposes." *See id.* at 608. That *Broderick* does not stand for the proposition that "solicitation" statutes are *per se* constitutional is illustrated by *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976), which invalidated on vagueness grounds an ordinance prohibiting charitable and political solicitations without notice to the police.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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